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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 5

SIDNEY STREET,

Appellant,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM

AARON E. KOOTA
District Attorney
Kings County
Office & P.O. Address
Municipal Building
Brooklyn, N.Y. 11201
Tel.: (212) 643-5100
Attorney for Appellees

HARRY BRODBAR
Assistant District Attorney
Of Counsel

32 CASE PRESS INC., 421 HUDSON ST., N.Y.—OREGON 5-4540

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IN THE

Supreme Court of the United States

October Term, 1967

No. 688

SIDNEY STREET,

Appellant,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Appellees.

MOTION TO DISMISS OR AFFIRM

Appellees, People of the State of New York, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, effective October 2, 1967, move to dismiss on the ground that the appeal is not within the jurisdiction of this Court, or, in the alternative, to affirm the order of the Court of Appeals of the State of New York appealed from, on the ground that the questions presented are so unsubstantial as not to need further argument.

Preliminary Statement

This is a direct appeal by the appellant from the order of the Court of Appeals of the State of New York, entered on July 7, 1967, affirming the order of the Appellate Term of the Supreme Court, Second Department, dated December 23, 1966, which affirmed the judgment of the Criminal Court of the City of New York, County of Kings, of August

9, 1966, convicting him of Malicious Mischief, Sec. 1425, subd. 16, para. d, of the Penal Law of the State of New York, said statute making it a misdemeanor to "publicly mutilate, deface, defile, or defy, . . . or cast contempt [upon], either by words or act . . . the flag of the United States of America." The sentence was suspended.

Opinion Below

The opinion of the Court of Appeals of the State of New York was handed down July 7, 1967 and is reported in 20 NY 2d 231, 282 NYS 2d 491, 229 N.E. 2d 187. See Jurisdictional Statement, Appendix, pp. 1a-8a, for text of the opinion. No written opinion or memorandum was handed down by the Appellate Term of the Supreme Court of the State of New York, Second Department, or the Criminal Court of the City of New York, County of Kings.

The Statute Involved

Section 1425 of the Penal Law of the State of New York provides in its pertinent parts as follows:*

"16. Any person, who

* * * * *

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* By L. 1965, c. 1031, Sec. 52, eff. Sept. 1, 1967, this statute has been superseded by Section 136 of the General Business Law of the State of New York in which the identical language is employed, except for a portion thereof not relevant herein. Since appellant has referred to the prior section in the Jurisdictional Statement, appellees will continue to do likewise with the understanding that the references are applicable to the more recent enactment.

d. *Shall publicly mutilate, deface, defile, or defy, trample upon, or cast contempt, either by words or act . . .*

• • • • •

f. [proscribing still another act] . . . *the flag of the United States of America . . .*

• • • • •

Shall be deemed guilty of a misdemeanor . . .

The words flag . . . as used in this subdivision or section, shall include any flag . . . upon which shall be shown the colors, the stars and the stripes, *in any number of either thereof,* or by which the person seeing the same, without deliberation, may believe the same to represent the flag . . . of the United States of America . . .

This subdivision shall not apply to any act expressly permitted by the statutes of the United States of America . . .'' (Emphasis supplied.)

Questions Presented

1. Should this Court depart from the well-recognized doctrine of 'mootness' since appellant's conviction carries with it no disabilities, and the period during which the suspended sentence imposed can be revoked under New York law (N.Y. Code Crim. Proc., Sec. 470-a) has now been concluded?

2. Is the statute (Sec. 1425, subd. 16, para. d, of the Penal Law of the State of New York, *supra*), on its face or as applied, an unwarranted abridgement of the constitutional guarantee of freedom of expression as mandated by the First Amendment to the United States Constitution?

3. Is the statute (Sec. 1425, subd. 16, para. d, of the Penal Law of the State of New York, *supra*) so ambiguous,

vague and indefinite on its face or as applied that it fails to adequately inform a person of the acts proscribed, or so overly broad, as to violate the Fourteenth Amendment to the United States Constitution?

Statement of the Case

The Trial

A.

The People's Case

At the commencement of the trial, the appellant moved to dismiss the complaint upon the ground that the First Amendment to the United States Constitution, as well as the Constitution of the State of New York (Article 1, Section 8), with regard to freedom of speech, protected his right to protest "in many forms, whether it be by burning a flag, demonstration or picketing," and that the appellant's act was a "form of demonstration and protest" (7).* The appellant's motion to dismiss the complaint was also predicated on the premise that the applicable statute was in violation of the Supremacy Clause of the United States Constitution. This argument, too, was not acceptable to the trial court, and that motion was likewise denied (8). A stipulation was entered into that the charges against the appellant, Malicious Mischief, and Disorderly Conduct, which had been set forth in two separate complaints, would be tried together, and that the facts adduced in one would be applied to the other "wherever necessary, and there will be separate findings on the facts and the law and separate judgments may be rendered" (8-9).

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*. Numbers in parentheses refer to pages in the certified Record on Appeal.

Patrolman James Copeland, a New York City Police Officer, testified substantially as follows:

On June 6, 1966, at or about 7:00 P.M., he had occasion to be present at Lafayette Avenue and St. James Place, in the County of Kings, City and State of New York, where he saw a crowd collected at the corner (9). There was a fire burning, and the officer got out of his car, and walked over toward the fire around which the crowd was standing (9-10). According to the officer, a large folded flag, which he recognized to be an American flag, was burning. After inquiring of the people in the crowd as to the identification of the person responsible for this, the officer walked over to the northwest side of Lafayette Avenue, on the other side of the street, where he saw the appellant standing and talking loudly (10-11). The appellant was motioning with his hands, and saying, "We don't need no damn flag". The officer asked him if he burned the flag, to which the appellant answered, "Yes, that is my flag; I burned it", and, "If they let that happen to Meredith* we don't need an American flag" (11). The officer then extinguished the fire, placed the appellant under arrest, and took him, and the remaining portion of the flag, to the precinct (11). According to the officer, about 30 people were present at the scene when the officer arrived, and by the time the arrest was made, about 35 to 40 people were in the group (11). He had been 10 or 15 feet from the appellant when he began to understand what the latter was talking about (12).

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* Referring to the unfortunate incident which occurred during a Civil Rights march when the noted Civil Rights Leader, James H. Meredith, was wounded by a sniper's bullet near Hernando, Mississippi, on June 6, 1966.

On cross-examination, the officer testified that at the time of the incident he had been in a patrol car with another officer, who was not then present in court. That officer had been present during the entire occasion, and the witness stated that if his partner were then in court he would substantiate the testimony (12). Prior to approaching the appellant, the officer parked his vehicle in front of the flag, on the northeast side of Lafayette Avenue and St. James Place, the appellant then standing on the northwest corner (12). There were people standing on all four corners, with about 30 persons on the northeast corner where the flag was, and 5 or 10 persons on the northwest corner where the appellant was then stationed (13). When the witness left the patrol car, he began to stamp out the burning flag. The officer left the flag on the ground and went over to the appellant across the street. Portions of the flag were picked up by the officer after the appellant was brought over to the patrol car (13-14). No crowd overflowed so as to obstruct traffic, and not all of the persons who stopped to see what was happening continued to move on (14). The wide sidewalk was not obstructed and persons were able to pass by. The crowd was not unruly, and neither were there any threats or shouts (14). According to the officer, who was acquainted with the correct manner of folding an American flag, it was folded with the stars and stripes facing up. He did not know if the flag had been folded in the proper way because "it was burned quite badly" (15). The flag had not been on a newspaper "or anything" (15).

B.

The Defense

The appellant testified in his own behalf substantially as follows:

He was employed as a bus driver by the New York City Transit Authority for 20 years, and was married. He had never appeared in a court before (15). He had served in the military service for a period of 5 years, and in the Quartermaster Corps. He was a recipient of the Bronze Star (16). On the day of the occurrence he had been in his apartment when he heard a news report that James Meredith had been shot. When he heard that he said, "They didn't protect him," and went to his dresser drawer and took out the American flag (16). The 48-star flag had been given to his wife's mother and had draped the coffin at the funeral of his wife's stepfather. The flag was faded, about 20 years old, and had been displayed by him on national holidays (17). He had a second flag with 50 stars. After hearing the broadcasted report about Meredith, he took the flag to St. James Place and Lafayette Avenue. There he placed a piece of newspaper on the ground, held the flag in his left hand, "struck a match and made a flame and I stood there and I held it as long as I could. When it began to burn my hand I dropped the flag" (17). The patrol car then came by, and the officer asked him if he had set fire to the flag (17-18). He admitted that he had, and told the officer, "If they do what they had (*sic*) to Meredith we don't need this flag" (18). No one else spoke to him, and he noticed no unusual crowd. The flag which was still burning when the officer came, was on the curb. The appellant did not speak to anyone else at the time (18).

On cross-examination, the appellant testified that the particular flag involved had been in the dresser drawer for at least one year, and that he had displayed a new flag the previous Memorial Day (18). The flag in question had not been displayed after the new one was purchased. When asked when he had decided to burn the old flag, the appellant testified that the idea of doing so had come when the new one was purchased. However, he did burn it after he heard that James Meredith had been shot, although "not immediately;" he had planned to burn the flag long before he "heard about Meredith" (19).

At the conclusion of the trial, the appellant was acquitted of the charge of Disorderly Conduct, and found guilty of Malicious Mischief in that he violated Section 1425, subd. 16, para. d, of the Penal Law, *supra,* (19), for which he received a suspended sentence (4, 24).

Summary of Arguments

This Court has long enunciated the doctrine of "mootness" wherein no attempt will be made to review an appeal on the merits without a showing of factors vital enough to move the Court from this traditional rule. It is the respectful submission of the appellees that there do not exist any considerations to veer this Court from the majority determination as recently declared as June 12, 1967 in *Jacobs* v. *New York,* 388 U.S. 431, 87 S. Ct. 2098, and, *Tannenbaum* v. *New York,* 388 U.S. 439, 87 S. Ct. 2107.

In addition, the statute in question, Sec. 1425, subd. 16, para. d, of the Penal Law of the State of New York, *supra,* designed to preserve the dignity of the flag of the United States of America, the cherished symbol of "our heritage

and our hopes,'"* is not vague or overbroad, nor is it an unreasonable restraint of free expression. There is a serious need for such legislation, especially in these critical times which appellees choose to refer to as an "era of arrogance." Proscribing the appellant's act of desecration is dictated by a legitimate State interest, and not solely by any desire to suppress underlying thought or opinion. The concern to protect the safety and well-being of a free and orderly society transcends individual liberties so that a reasonable restraint upon the exercise of free expression becomes warranted in order to assure that a greater good will be accomplished. It is the appellees' intention to emphasize the vital need for such a statute, and in so doing, to establish that the questions presented by the appellant are so unsubstantial as to preclude any further argument in this Court.

THE ARGUMENTS

I.

The Question is Moot.

It is the respectful submission of the appellees herein that since the sentence imposed upon the appellant was suspended on August 9, 1966, and the conviction carries no disabilities such as loss of civil rights, the doctrine of "mootness" can be properly applied after the period during which such suspended sentence can be revoked and replaced by a prison sentence which, in the State of New York, is one year from the date of original sentence. (See N.Y. Code Crim. Proc., Sec. 470-a.) Neither New York law nor

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* Mr. Justice Frankfurter in *West Virginia Board of Education* v. *Barnette,* 319 U.S. 624, 662, 63 S. Ct. 1178, 1196 (1943) (dissenting opinion).

federal law imposes any further penalty for conviction of the misdemeanor involved in this appeal. Consequently, we are constrained to rely on the authority of the majority holdings in *Jacobs* v. *New York*, 388 U.S. 431, 87 S. Ct. 2098 (1967), *supra*, and *Tannenbaum* v. *New York*, 388 U.S. 439, 87 S. Ct. 2107 (1967), *supra*,* wherein this Court applied the doctrine of "mootness" in situations substantially similar to the case at bar, and which also involved first amendment considerations.

Any contention that the appellant's "subsequent conduct will be significantly chilled by the conviction on his record" (See *Jacobs* v. *New York*, 388 U.S. at 433, 87 S. Ct. at 2099, *supra*, Warren, C.J., dissenting opinion) cannot be legally acceptable in the light of the appellees' claim that the conduct upon which the conviction was predicated is not constitutionally-protected, and will continue to be reprehensible in nature, thereby dissipating all claims that fundamental rights have been interfered with (ARGUMENT II, *infra*).

Although in *Jacobs*, *supra*, the appellants argued that "they should not be constitutionally convicted because their conduct demonstrates their good-faith belief that they were not exhibiting obscene material" (388 U.S. at 433, 87 S. Ct. at 2100), such a contention appears to rest on more tenable ground, because of the prevalence of conflicting notions regarding views as to what is obscene, than would any position concerning flag-desecration which appellees herein do not feel can be recognized on first impression to be within the ambit of protection afforded by the United States Constitution. Thus, it cannot be truly propounded that there will be an *in terrorem* effect if the

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* In Tannenbaum, *supra*, rehearing was denied (388 U.S. October 9, 1967).

Court does not note jurisdiction and declines to review the case on the merits.

With regard to the appellant herein, there is no pecuniary interest in the outcome of this appeal for there is nothing that can be claimed to be the subject of forfeiture. To reiterate, also, there is no loss of civil rights. (Compare *Fiswick* v. *United States,* 329 U.S. 211, 67 S. Ct. 224 [1946]; *United States* v. *Morgan,* 346 U.S. 502, 74 S. Ct. 247 [1954].)

In *St. Pierre* v. *United States,* 319 U.S. 41, 42, 63 S. Ct. 910, 911 (1943), this Court stated:

> "A federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of litigants in the case before it [citing cases]."

It is also significant that in *St. Pierre, supra,* it was also advanced:

> "Petitioner also suggests that the judgment may impair his credibility as a witness in a future legal proceeding. But the moral stigma of a judgment which no longer affects legal rights does not present a case or controversy for appellate review." (*Id.* at 43, 63 S. Ct. at 911-12.)

Unlike the appellant in *Parker* v. *Ellis,* 362 U.S. 574, 80 S. Ct. 909 (1960), the appellant herein was represented by counsel at all stages of the proceeding.

In view of the foregoing, it is respectfully urged that contrary to the position taken by Mr. Chief Justice Warren in his dissenting opinion in *Jacobs* v. *New York,* 388 U.S. 431, 434, 87 S. Ct. 2098, 2100 (1967), *supra,* this Court would not be "straining the mootness doctrine" if the said doctrine were applied to the instant appeal.

II.

The Statute, as a proper exercise of the State's police power, does not unconstitutionally denigrate appellant's fundamental right of expression, symbolic or otherwise, and is clearly defined, being neither vague, imprecise nor overly broad.

Sec. 1425, subd. 16, para. d, of the Penal Law of the State of New York, *supra*, provides that any person who shall "publicly mutilate, deface, defile, or defy, trample upon, or cast contempt upon either by words or act" any flag of the United States of America, said flag described as one showing the "colors, the stars, and the stripes . . . or by which the person seeing the same, without deliberation may believe the same to represent the flag . . . of the United States of America," shall be guilty of a misdemeanor.

The appellees are mindful of the fact that a State may not unreasonably make any law abridging freedom or liberty of speech (First and Fourteenth Amendments to the United States Constitution). (See *Gitlow* v. *New York*, 268 U.S. 652, 666, 45 S. Ct. 625, 630 [1924]; *Whitney* v. *California*, 274 U.S. 357, 373, 47 S. Ct. 641, 647 [1927]; *Grosjean* v. *American Press Co.*, 297 U.S. 233, 243, 244, 56 S. Ct. 444, 446 [1936].) The right to "speak freely" is the foundation of democratic government, and as expounded by Mr. Justice Holmes in *United States* v. *Schwimmer*, 279 U.S. 644, 654-55, 49 S. Ct. 448, 451 (1929) (dissenting opinion), "[I]f there is any principle of the [U.S.] Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought we hate." Yet it is significant that until about 1922, the United States Su-

preme Court accepted the view that the Fourteenth Amendment did not make the First Amendment binding on the States. (See *Prudential Insurance Co.* v. *Cheek*, 259 U.S. 530, 543, 42 S. Ct. 516, 522 [1922].) In 1925, the Court in *Gitlow* v. *New York, supra,* at 666, 45 S. Ct. at 630, "ventured the tentative assumption that the 'freedom' of speech protected by the First Amendment was included in the 'liberty' which the Fourteenth Amendment required the states to respect." (See DUMBAULD, BILL OF RIGHTS AND WHAT IT MEANS TODAY 133 [1957].) Eventually, through the process of "incorporation" or "absorption," all of the First Amendment liberties were made binding against the States. In the area of free speech, the case of *West Virginia State Board of Education* v. *Barnett*, 319 U.S. 624, 633, 63 S. Ct. 1178, 1183 (1943), is particularly noteworthy as showing just when a State may not be permitted to censor or suppress expression of opinion. Thus, although a flag salute was involved, it was this Court's majority view that "[t]o sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind." (*Id.* at 634, 63 S. Ct. at 1183.)

Yet, conceding the sacrosanct nature of First Amendment freedoms, particularly the one concerned with free speech, it is respectfully submitted that a State may, in the exercise of its police power, place reasonable regulations and restrictions upon this constitutional guarantee in the interest of public order. (See *Davis* v. *Massachusetts*, 167 U.S. 43, 47, 17 S. Ct. 731, 733 [1897]; *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 439, 31 S. Ct. 492, 497 [1911]; *Schenck* v. *United States*, 249 U.S. 47, 52, 39 S. Ct. 247, 249 [1919];

Gitlow v. *New York*, 268 U.S. 652, *supra*, at 667, 45 S. Ct. at 630; *Whitney* v. *California*, 274 U.S. 357, 371, 47 S. Ct. 646, 647 [1927], *supra*.)

In order to sustain the position of the appellees herein, it becomes vital to point out in some detail the philosophy underlying the need for a statute such as Sec. 1425, subd. 16, para. d, of the Penal Law of the State of New York, *supra*.

In *People ex rel. McPike* v. *Van De Carr*, 91 App. Div. 20, 26 (1st Dept. 1904), *aff'd*, 178 N.Y. 425 (1904), Mr. Justice Patterson, in emphasizing the need for the statute, stated as follows:

> "It was competent for the Legislature to make it a misdemeanor to publicly mutilate, deface, defy, defile, trample upon or cast contempt, either by word or act, upon the National or State flag, and mutilation of the flag may mean the printing of an advertisement on the ensign itself. Such legislation is within the police power of the State, for it relates to the preservation of the peace. It tends to prevent the commission of acts which would arouse the indignation of the public and lead to the infliction of summary chastisement upon an offender; for *it is not a mere rhetorical phrase to say that the people have constituted themselves the guardians and protectors of the National flag.* The State has taken upon itself the punishment of those whose acts would excite the people to violence, and legislation to accomplish that result relates directly to the preservation of the public peace and the good order of society." (Emphasis supplied.)

It is significant that Mr. Justice Patterson's language was later unanimously approved by the Court of Appeals (178 N.Y. 425, *supra*), although the court also affirmed a

finding that another portion of the statute, not pertinent herein, was constitutionally defective since it was improperly applied, also, to articles manufactured and in existence before the section was enacted, thereby destroying existing property rights.

Nor has the Supreme Court of the United States failed to voice its feeling about the "object of national piety" (*Durable Toy & Novelty Corporation* v. *J. Chein & Co.*, 133 F. 2d 853, 855 [2d Cir. 1943] [Cir. Judge Learned Hand]). In *Halter* v. *Nebraska*, 205 U.S. 34, 27 S. Ct. 419 (1906), the Court (per Mr. Justice Harlan), in passing upon the constitutionality of a statute which proscribed the use of the flag for advertising purposes, stated:

> "From the earliest periods in the history of the human race, banners, standards and ensigns have been adopted as symbols of the power and history of the peoples who bore them. It is not then, remarkable that the American people, acting through the legislative branch of the Government, early in their history, prescribed a flag as symbolical of the existence and sovereignty of the Nation. Indeed, it would have been extraordinary if the Government had started this country upon its marvelous career without giving it a flag to be recognized as the emblem of the American Republic. For that flag every true American has not simply an appreciation, but a deep affection. No American, nor any foreign-born person who enjoys the privileges of American citizenship, ever looks upon it without taking pride in the fact that he lives under this free Government. Hence, it has often occurred that insults to a flag have been the cause of war, and indignities put upon it, in the presence of those who revere it, have often been resented and sometimes punished on the spot. (*Id.* at 41, 27 S. Ct. at 421.)

> "[W]e are of opinion that those who enacted the statute knew, what is known of all, that to every true American the flag is the symbol of the Nation's power, the emblem of freedom in its truest, best sense. It is not extravagant to say that to all lovers of the country it signifies government resting on the consent of the governed; liberty regulated by law; the protection of the weak against the strong; security against the exercise of arbitrary power; and absolute safety for free institutions against foreign aggression. As the statute in question evidently had its origin in a purpose to cultivate a feeling of patriotism among the people of Nebraska, we are unwilling to adjudge that in legislation for that purpose the State erred in duty or has infringed the constitutional right of anyone. On the contrary, it may reasonably be affirmed that a duty rests upon each State in every legal way to encourage its people to love the Union with which the State is indissolubly connected." (*Id.* at 43, 27 S. Ct. at 422.)

Although *Halter, supra,* was concerned with the use of a representation of the flag in an advertising scheme, the case is nevertheless pertinent because the statute therein involved contained language substantially analogous to the statute now before this Court.

It is also significant that many States have subscribed to the view that the flag of the United States merits respect as a symbol of Americanism, and "an object of patriotic adoration" (*Halter* v. *State,* 74 Neb. 757, 105 N.W. 298, 300 [1905].) Accordingly, the Legislatures of those States have promulgated legislation to protect its meaning.*

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* See *Halter* v. *Nebraska,* 205 U.S. 34, 39-40, 27 S. Ct. at 421, *supra.* Other states have since followed suit.

In *People* v. *Picking*, — Misc. —, 23 N.Y.S. 2d 148, 149 (N.Y. City Mag. Ct. 1940), *aff'd*, 263 App. Div. 366 (1st Dept. 1942), *aff'd*, 288 N.Y. 644 (1942), *cert. denied*, 317 U.S. 632 (1942), *rehearing denied*, 317 U.S. 708, 63 S. Ct. 156 (1942), the court referred to the instant statute as a "salutary one," and that "[i]ts aim is to hold up the dignity of the American Flag, the Flag that is the hope of the world and the Symbol of what perhaps is the last true democracy on the face of the earth, today." The Court of Appeals affirmed the judgment of conviction of the trial court and upheld the constitutionality of the statute without opinion. The conduct condemned by the trial court had been one which involved the placing of an advertisement on a car in close proximity to the flag of the United States.

Section 1425, subdivision 16, of the Penal Law, *supra*, has been the subject of interpretations through the years. In 1934, Hon. John J. Bennett, Jr., as Attorney General of the State of New York, advanced the opinion that the "intent of the legislature in enacting Section 1425 was to insure that the use of the Flag of the United States, or of the representation thereof be appropriate and respectful." (See 51 N.Y. State Dept. Rep. 240 [1934].) "The statute is comprehensively designed to prevent desecration of the Flag . . . of the . . . United States." (See 1941 N.Y. Att'y Gen. Rep. 465)

Any contention that Sec. 1425, subd. 16, para. d, of the Penal Law, *supra*, is inconsistent with 36 U.S.C.A., Section 176(j),* and, thus, violative of the Supremacy Clause of the United States Constitution, would be inappropriate.

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* 36 U.S.C.A., Sec. 176(j): "The flag, when it is in such condition that it is no longer a fitting emblem for display, should be

There is no provision in the federal law which prohibits a State from enacting and enforcing legislation designed to prevent disrespect to a symbol of Americanism.* The American flag is as much a part of a State as it is of the Nation. Any contempt cast on it also affronts the dignity and well-being of a State. (*Halter* v. *Nebraska, supra.*)

That a State has the power to so legislate was succinctly expressed by Mr. Justice Harlan in *Halter* v. *Nebraska,* 205 U.S. 34, 27 S. Ct. 419, *supra,* as follows:

> "In our consideration of the questions presented we must not overlook certain principles of constitutional construction, long ago established and steadily adhered to, which preclude a judicial tribunal from holding a legislative enactment, Federal or state, unconstitutional and void, unless it be manifestly so. Another vital principle is that, except as restrained by its own fundamental law, or by the Supreme Law of the Land, a State possesses all legislative power consistent with a republican form of government; therefore, each State, when not thus restrained, and so far as this court is concerned, may, by legislation, provide not only for the health, morals and safety of its people, but for the common good, as involved in the well-being, peace, happiness and prosperity of the people." (*Id.* at 40-41, 27 S. Ct. at 421.)

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destroyed in a dignified way, preferably by burning. June 22, 1942, c. 435, sec. 4, 56 Stat. 379; Dec. 22, 1942, c. 806, sec. 4, 56 Stat. 1076." This subdivision is prefaced by the language, "No disrespect should be shown to the flag of the United States of America . . . ."

* In fact the statute formulated as the result of Hearings before Subcommitte No. 4 of the Committee of the Judiciary, House of Representatives, 90th Congress, 1st Session, 1967, Report No. 350, wisely dispels any doubt in this regard by expressly reserving to the "State, territory, possession of the Commonwealth of Puerto Rico . . . jurisdiction over any offense over which it would have jurisdiction in the absence of this section" (H.R. 10480, chapter 33, title 18, U.S.C.A., Sec. 700, subsec. [c]).

"It may be said that, as the flag is an emblem of National sovereignty, it was for Congress alone, by appropriate legislation, to prohibit its use for illegitimate purposes. We cannot yield to this view. If Congress has not chosen to legislate on this subject, and if an enactment by it would supersede state laws of like character, it does not follow that, in the absence of National legislation, the State is without power to act. There are matters which, by legislation, may be brought within the exclusive control of the General Government, but over which, in the absence of National legislation, the State may exert some control in the interest of its own people. . . . [A] State may exert its power to strengthen the bonds of the Union and therefore, to that end, may encourage patriotism and love of country among its people. When by its legislation, the State encourages a feeling of patriotism towards the Nation, it necessarily encourages a like feeling towards the State. One who loves the Union will love the State in which he resides, and love both of the common country and of the State will diminish in proportion as respect for the flag is weakened. Therefore a State will be wanting in care for the well-being of its people if it ignores the fact that they regard the flag as a symbol of their country's power and prestige, and will be impatient if any open disrespect is shown towards it." (*Id.* at 41-42, 27 S. Ct. at 421-22.)

In *Ex parte Starr*, 263 F. 145, 146 (Dist. Ct., Mont. 1920), it was held that a State statute was not pre-empted by Federal legislation which "neither pardons the offense nor draws it within Federal jurisdiction."

It is noteworthy that a statute similar to the instant one was passed in the District of Columbia in 1917 (4 U.S.C.A., Sec. 3).

See 36A, C.J.S., 746, sec. 2, (Flags: Laws Relating to United States or State Flags).

In fine, both the New York and federal statutes do not conflict with each other since both are designed to prohibit that conduct for which the appellant herein was tried and found guilty.

It is the appellant's contention that the statute herein involved, designed to protect the flag of the United States, estops persons from "communicating, by actions relating to that symbol, a contrary message" (Jurisdictional Statement, p. 11), and "not only deprives persons of the rights guaranteed them by the First Amendment but deprives society of its most effective means for self-correction" (Jurisdictional Statement, p. 12). This, stresses the appellant, occurs when it is sought to "choke off the *peaceful,* though non-verbal, means by which . . . citizens can make their message known . . . (Jurisdictional Statement, p. 12, emphasis supplied). Yet in the cases relied upon by the appellant (*Edwards* v. *South Carolina,* 372 U.S. 229, 235, 236, 83 S. Ct. 680, 683, 684 [1963]; *Peterson* v. *City of Greenville* [South Carolina], 373 U.S. 244, 247, 83 S. Ct. 1119, 1121 [1963]; *Williams* v. *Wallace,* 240 F. Supp. 100, 104-05 N.D. Ala. [1965]; *Brown et al.* v. *Louisiana,* 383 U.S. 131, 141-42, 86 S. Ct. 719, 723-24 [1966]), the acts evinced therein were those of "peaceful" conduct.

Accord, Stromberg v. *California,* 283 U.S. 359, 366, 51 S. Ct. 532, 534 (1931); *Thornhill* v. *California,* 310 U.S. 88, 94, 60 S. Ct. 736, 740 (1940); *Carlson* v. *California,* 310 U.S. 106, 110-11, 60 S. Ct. 746, 748 (1940); *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624, 63 S. Ct. 1178 (1943), *supra; Garner* v. *Louisiana,* 368 U.S. 157, 170, 172,

82 S. Ct. 248, 255, 256 (1961), wherein the various acts depicted were likewise not beset with agitation.

The appellant's behavior in burning a symbol of Americanism in a public place, while simultaneously spewing words of contempt, was not an act of "peaceful" expression entitled to constitutional protection. This act of "violence,"* regardless of its degree, cannot be protected albeit the appellant verbally expressed views such as, "We don't need no damn flag," and, "If they let that happen to Meredith we don't need an American flag" (11). (Compare *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 498, 502, 69 S. Ct. 684, 688-89, 690-91 [1949], wherein it was held that violence or other unlawful conduct will not be protected "merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.")

Accord, Cox v. *Louisiana,* 379 U.S. 536, 555, 85 S. Ct. 453, 464-65 (1965); Same parties, 379 U.S. 559, 564, 85 S. Ct. 453, 480-81 (1965).

Yet, even if we are to assume, *arguendo,* that the conduct of the appellant was expression by symbolic speech, it is respectfully reiterated, nevertheless, that from its very nature, attaching to it the protection accorded by the First Amendment to the United States Constitution would be unwarranted. Symbolic speech has never been given the same significance as the written or spoken word. As stated by Mr. Justice Goldberg in *Cox* v. *Louisiana,* 379 U.S. 536, 555, 85 S. Ct. 453, 464-65 (1965), *supra*:

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* "Violence" is defined as follows: 1a: exertion of any physical force so as to *injure or abuse* . . . , 2: injury in the form of revoking, *repudiation* . . . or *irreverence to a thing* . . . , 3b: *vehement feeling or expression.* . . ." (Webster's New Int. Dictionary [3rd ed. 1964] [emphasis supplied].)

> "We emphatically reject the notion . . . that the First and Fourteenth Amendments afford the *same kind of freedom* to those who would communicate ideas by conduct such as patrolling, marching and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech." (Emphasis supplied.)

In a more recent case, this Court, in a majority holding, rejected the argument that "people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please." (See *Adderley* v. *Florida,* 385 U.S. 39, 47-48, 87 S. Ct. 242, 247 [1966] [Black, J.].)

Thus, Mr. Justice Black has also drawn a line between speech and conduct.

See also, *People* v. *Stover,* 12 N.Y. 2d 462 (1963), *appeal dismissed,* 375 U.S. 42 (1963) (symbolic expression "offending sensibilities"); *People* v. *Martin,* 15 N.Y. 2d 933 (1965), *cert. denied,* 382 U.S. 828 (1965) (sit-in); *People* v. *Penn,* 16 N.Y. 2d 581 (1965), *cert. denied,* 383 U.S. 969 (1966) (picketing).

To reiterate, "peaceful" acts of protest have been recognized as permissible. Appellant states that "those who have greatest cause to protest are those who, by reason of economic and educational deprivation, do not have access to the mass media and cannot undertake the lobbying activities of better endowed groups . . . [and] [p]ublic demonstrations symbolizing their grievances are often their only recourse" (Jurisdictional Statement, p. 9). This can be no license for conduct deemed "violent" in nature for such disadvantaged persons ofttimes have their desire for pro-

test satisfied by eloquent and articulate champions of their causes who command respect and who are successful in attaining worthwhile goals. It would now appear that any differences in the "access to the mass media" and "lobbying activities" between such persons and "better endowed groups" is negligible indeed. There is no desire to choke off *responsible* expression, verbal or non-verbal, and public desecration of the flag of our Country, contrary to the view of appellant, can never be an effective means of society's self-correction, but can only lead to destruction. (See Jurisdictional Statement, pp. 11-12.)

Any contention that the instant statute is tantamount to a "prior restraint" of speech, and therefore constitutionally objectionable, is without merit. The statute, being a narrowly-drawn one, does not leave in an unreasonable and discriminatory fashion the determination as to what "words or act" will violate its terms. (Compare *Lovell* v. *Griffin,* 303 U.S. 444, 58 S. Ct. 666 [1938]; *Cantwell* v. *Connecticut,* 310 U.S. 296, 60 S. Ct. 900 [1940]; *Saia* v. *New York,* 334 U.S. 558, 559-60, 68 S. Ct. 1148, 1149-50 [1948]; *but cf. Kovacs* v. *Cooper,* 336 U.S. 77, 82-83, 69 S. Ct. 448, 451 [1949]).

See also, *Tenney* v. *Liberty News Distributors, Inc.,* 27 Misc 2d 692, 211 NYS 2d 733 (Sup. Ct. 1960).

It is the appellant's contention that his act of desecrating the flag in the manner he did "is not an 'incitement to riot,' was was found to exist in *Feiner* v. *New York,* 340 U.S. 315 (1940)," or within the " 'clear and present danger' which would authorize interference with his First Amendment rights" (Jurisdictional Statement, p. 15).

It would appear that the appellant seeks to rely solely upon the application of such tests to the facts in the instant appeal. Notwithstanding this, however, it is the appellees' respectful submission that other tests are equally applicable.

The classic "clear-and-present-danger" test is succinctly set forth in *Schenck* v. *United States*, 249 U.S. 47, *supra*, at 52, 39 S. Ct. at 249 (1919),* when Mr. Justice Holmes expressed the view that "[t]he question in every case is whether the words used are used in such circumstances and and are of such a nature to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."

However, it now appears that in recent Supreme Court decisions, particularly in those matters involving narrowly-drawn statutes which on their face regulate conduct, rather than the communication of ideas, as in *Schenck*, the "clear-and-present-danger" test has been replaced with a "balancing-of-interests" test. Prior to then, and according to Mr. Justice Brandeis, who, as co-architect, amplified the "clear-and-present-danger" test, "no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an

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* *Schenck* involved mere speech as a means by which to accomplish sedition in time of war, and in violation of the Espionage Act of June 15, 1917. *Accord, Frowerk* v. *United States*, 249 U.S. 204, 39 S. Ct. 249 (1919); *Debs* v. *United States*, 249 U.S. 211, 39 S. Ct. 252 (1919).

emergency can justify repression." (See *Whitney* v. *California*, 274 U.S. 357, 377, 47 S. Ct. 641, 649 [1927], *supra*, [concurring opinion].) Yet, despite the views of Mr. Justices Holmes and Brandeis, it thereafter became necessary to apply a "balancing-of-interests" test by which "conduct [was] regulated in the interest of public order" so that it became necessary to allow the operation of a regulation albeit there was an "indirect, conditional, partial abridgement of speech." (See *American Communications Assn* v. *Douds*, 339 U.S. 382, 399, 70 S. Ct. 674, 684 [1950].)* Now the stage was set for the courts to decide which of two conflicting interests dictated the greater need for protection. The courts in applying this new formula would be required in each case to "balance the individual and social interest in freedom of expression against the social interest sought by the regulation which restricts expression." (See Emerson, *Towards a General Theory of the First Amendment*, 72 Yale L.J. 877, 912 [1963].)

Thus, in *Dennis* v. *United States*, 341 U.S. 494, 510, 71 S. Ct. 857, 868 (1951), *affirming* 183 F. 2d 201, 212 (2d Cir. 1950), four of the six members of the Court who joined in upholding the conviction, accepted Chief Judge Learned Hand's restatement of the "clear-and-present-danger" test,** thereby diluting it into a balancing test.

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* It was in *Douds* that Mr. Chief Justice Vinson first enunciated the "balancing-of-interests" test.

** The restatement by Judge Hand is inherent in the language: "In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger. We have purposely substituted 'improbability' for 'remoteness,' because that must be the right interpretation. Given the same probability, *it would be wholly irrational to condone future evils which we should prevent if they were immediate;* that can be reconciled only by an indifference to those who come after us." (183 F. 2d at 212, emphasis supplied.)

That the "balancing" test has continued to maintain its effectiveness is evident from the holdings in *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449, 461, 78 S. Ct. 1163, 1171 (1958); *Barenblatt* v. *United States*, 360 U.S. 109, 126-27, 79 S. Ct. 1081, 1093 (1959); *Konigsberg* v. *State Bar*, 366 U.S. 36, 49-51, 81 S. Ct. 997, 1006-07 (1961); *United States* v. *Aarons*, 310 F. 2d 341, 345 (2d Cir. 1962);* and *United States* v. *Miller*, 367 F. 2d 72 (2d Cir. 1966), *cert. denied*, 386 U.S. 911 (1967).**

The "balancing-of-interests" test denies that any speech has an absolute right of protection under the First Amendment. That free speech is not absolute was also recognized by Mr. Justice Brandeis in *Whitney* v. *California*, 274 U.S. 357, 373, 47 S. Ct. 641, 647 (1927), *supra*, (concurring opinion).†

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* It is interesting to point out the court's statement (per Circuit Judge Friendly) that "[e]ven if we were to assume in appellant's favor that action designed 'to block the launching' constituted speech . . . , 'freedom of speech . . . does not comprehend the right to speak on any subject at any time', American Communications Assn v. Douds, 339 U.S. 382, 394 . . ." (310 F. 2d at 345.)

** Although it is respectfully submitted that the willful mutilation of a draft card is far less significant than the wanton destruction of a symbol of freedom, the *Miller* case condemns such an act nevertheless. (*But cf. United States* v. *O'Brien*, 376 F. 2d 538 [1st Cir. 1967] [now pending before this Court]). Since a draft card is the personal property of a registrant, the impact of burning it does not appear to be as serious as the desecration of the flag of the United States which belongs to the citizenry at large. See also, *Smith* v. *United States*, 368 F. 2d 529 (8th Cir. 1966).

† It is significant that in *Board of Education* v. *Barnette*, 319 U.S. 624, 643, 63 S. Ct. 1178, 1188 [1943], *supra*, Mr. Justices Black and Douglas stated that "[n]o well-ordered society can leave to the individuals an absolute right to make final decisions, unassailable by the State, as to everything they will or will not do. The First Amendment does not go so far."

Yet, even the "clear-and-present-danger" test as restated by Judge Hand in *United States* v. *Dennis* (2d Cir. 1950), 183 F. 2d 201, 212, *supra,* has not entirely lost its vitality for as one writer has observed:

> "Its essential features have been preserved, but adapted to the peculiar fact-situation presented by the menace of current Communist enterprise. In its new form the rule might be called the 'electric eye' theory of clear and present danger. The danger is deemed to exist if there is a present and continuing mechanism which upon the occurrence of appropriate conditions will trigger into activity a future operation which constitutes a danger of substantial magnitude." (See DUMBAULD, BILL OF RIGHTS AND WHAT IT MEANS TODAY 122 [1957], *supra.*)

Ought not the atmosphere of these times also prompt us to deem the application of such a test (as restated by Chief Judge Learned Hand) as equally appropos? Is not the appellant's act (although having affected the sensory perceptions of but a relatively small segment of our population on a Brooklyn street) *when taken with the manifold dangerous behaviorisms of our day,** *one which may "trigger into* activity a future operation which constitutes a danger of substantial magnitude?" Is the act less dangerous because its effect, unlike in *United States* v. *Dennis,* 341 U.S. 494, 71 S. Ct. 857 (1951), *supra,* does not *immediately* envelop a much larger audience? Does not the rebellion of the appellant have the same imminent devastating effect as the acts of Dennis and his followers?

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* See p. 30, *infra.*

The "clear-and-present-danger" test has never been a technical verbal formula. (See *Pennekamp* v. *Florida*, 328 U.S. 331, 352-53, 63 S. Ct. 1029, 1040 [1946] [Frankfurter, J., concurring].). And whether or not the modified test of Chief Judge Learned Hand be applied, it, too, as the "balancing-of-interests" test, can be practically considered in the instant appeal so that the appellant's act cannot escape the reprobation it so richly deserves. Is not an act such as committed by the appellant one which will "treasonably" lend aid and comfort to the enemy by strengthening its hand? Any failure to preserve law and order creates the clear and present danger that the expression involved, *symbolic or otherwise*, "will bring about the substantial evils that Congress has a right to prevent." (*Schenck* v. *United States*, 249 U.S., *supra*, at 52, 39 S. Ct. at 249 [1919].). The question of free expression must yield to the higher requirement that the United States of America must survive in the hostile atmosphere of a tumultuous present-day history. It is this vital need which makes even the words by the appellant, in derogation of the flag, without more, subject to criminal punishment. The danger of undermining the morale of our fighting men abroad by public acts of flag-desecration, whether by "words or act," will, if such misdeeds go unpunished, produce serious and disastrous consequences upon the well-being and security of the Nation. Circumstances appear again to have restored the *Schenck*, *Frowerk*, and *Debs* cases,* to a new vitality.

The American flag symbolizes everything dear to us, and is entwined within the very framework of our Bill of Rights.

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* *Schenck* v. *United States*, 249 U.S. 47, 39 S. Ct. 247 (1919), *supra*; *Frowerk* v. *United States*, 249 U.S. 204, 39 S. Ct. 249 (1919), *supra*; *Debs* v. *United States*, 249 U.S. 211, 39 S. Ct. 252 (1919).

The flag is a home away from home and throughout the world whenever an American chances to see it, the inspiration derived from its presence is immeasurable. To accord the appellant license to mistreat the flag is as implausible and inconceivable as a determination that one has a constitutional right to destroy the Constitution. For it was on June 14, 1777 that "Old Glory" was formally adopted by the Continental Congress as the national flag, and ". . . the flag like the nation itself, evolved slowly and painfully from small beginnings; that it was shaped by many hands and brains. . ." (Butterfield, *Foreword* to Quaife, Weig & Appleman, THE HISTORY OF THE UNITED STATES FLAG at 11 [1961].) To sanction the appellant's conduct as constitutionally-protected expression is to lend aid and comfort to those who seek to corrupt the very foundation of the liberties we seek to preserve. Thus, those liberties which are inherent in the wellspring of Democracy are demeaned and negated so that the cherished liberty of free speech, symbolic or otherwise, becomes slowly and undeniably destroyed, rather than perpetuated. Contempt and hatred are contagious and misanthropes, totalitarians, and malcontents harken to their call. To paraphrase Mr. Chief Justice Hughes, the excesses of free speech are apt to destroy free speech itself, unless properly fettered. (See *Cox* v. *New Hampshire*, 312 U.S. 569, 574, 61 S. Ct. 762, 765 [1941].) The appellant by his conduct was in a manner openly inviting others to share his contempt for the flag and the country it represents. It is in these times, especially, that honor to the flag must be given its fullest meaning. To condone the public disapprobation of a symbol of America itself is (especially when combined with such present-day events as the assassination of a President, destroying of draft cards, wholesale evacuations

to Canada to avoid military service for the United States, student riots in Ft. Lauderdale and other sections of our Nation, conflagrations and disturbances in socially and economically-disadvantaged areas, emergence of a "hippie" generation, open contempt for decorum on the part of elected officials in positions of trust, rise in crime statistics, activities of extremist groups, the new "palliative" (?) world of LSD and its psychedelic adventures)* a vivid portrait of disrepect for our institutions. Society may soon find it exceedingly onerous to withstand the challenges of an era of arrogance. Can anyone of us, today, honestly and confidentally take the position that the appellant's act of defiantly burning the flag, if ignored, will not ignite the spark which will flare into chaos and rebellion tomorrow? One need not be a prophet of doom to state that we must look at reality with a circumspect eye. It would be the height of naiveté to say that we are living in a predominantly patriotic society free from undermining influences. It would appear reasonable to state that we are part of a society which consists of a significant populace who either have chaotic and anarchic thought, on the one hand, or, who harbor cold indifference, on the other. To legitimatize the appellant's unforgiveable act is to draw the attention of the world to our problems, with ensuing disrespect. Certainly there can be no reverence for a flag that can be defiled and treated with contempt. Nor will there be any meaning left for the

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* In the light of these events which have occurred in our Country in recent times, it would not be unreasonable to question the appellant's statement that "we have long since passed the era that the threat of an angry crowd, or resentment by the listener against what is said, is a substantive reason for enactment of a statute that on its face restricts free speech" (Jurisdictional Statement, p. 15).

flag which draped the caskets of those who shed their lives for our Nation, and inspired countless deeds of glory. To dignify the appellant's conduct is to reduce the flag to an empty piece of cloth, and to transform it from meaningfulness to meaningless ornament. If the flag is now to take on merely an ornamental significance, then can it not be said that those who have shed their lives for it were not only duped by it, but that it has made a mockery of patriotism? *It cannot be denied that to scorn a flag is to erode a nation!*

There is a public interest in having our flag waving as a symbol of the United States. Disrespect for it is inimical to the public welfare and can only encourage others to do the same. The flag must continue to remain in an exalted position as symbolic of unity, strength, and friendly recognition. Where healthy criticism may help to correct, the appellant's act can only chip away at the pillars of democracy.

Insofar as the appellant's act is concerned, patriotism cannot take a "back seat" to any purported right of free expression the appellant now seeks to assert. His conduct, if unchecked, will further debilitate and debauch public morals, for it transcends permissive expression.

While such cases as *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624, 63 S. Ct. 1178 (1943), *supra,* hold that one need not salute the flag, it does not follow from such a determination that it can become the proper subject of desecration, or upon which to cast calumny. The statute extirpated in *Barnette, supra,* compelled positive action of saluting the flag. The present statute does not require any affirmative action nor does it prescribe orthodox conduct. It simply forbids public acts of dishonor

to the flag of the United States. The right to communicate ideas or engage in political dissent or protest in a *responsible* manner remains unimpaired. The encouraging of reverence and respect for the flag is not to be equated with "compelling an expression of belief in violation of the First Amendment" (Jurisdictional Statement, p. 15). Such encouraging becomes instilled in others when "words or act[s]" of defilement of the flag are not caused to be impressed upon their senses.

It would be ironic indeed to maintain that we have a duty to punish those who "bring into public odium any foreign government . . . or bring into public disrepute its political, social, or economic acts or views" (see *Frend* v. *United States*, 100 F. 2d 691, 692 [D.C. Cir. 1938]), without conceding that we have the correlative obligation of similarly punishing those whose acts are also as offensive to us, particularly when the act complained of is the burning of our cherished flag. (See N.Y. Times, April 11, 1967, p. 8, col. 1, wherein it was reported that oral protest was presented by Robert H. McBride, the United States Embassy Minister, to Jacques de Beaumarchais, director of Political Affairs at the Foreign Ministry, for the flag-burning incident in Paris on April 7, 1967.)

To vindicate the appellant's right to express himself in the manner he did, if indeed it be deemed symbolic speech, is to create an "open sesame" to like conduct. On the other hand, to condemn the appellant's act, as it should be, will not be a sign of fanaticism but, rather, of patriotism. (Compare *ex parte Starr*, 263 F. 145 [Dist. Ct., Mont. 1920], *supra*.) It is the appellees' respectful submission that there is a danger to organized government in defiling

its flag, notwithstanding appellant's contrary view (See Jurisdictional Statement, p. 15).

In fine, we must protect our country at all times. The anticipation of an attempt to overthrow our basic tenets of democracy by arrogant behavior designed to flaunt our institutions, and flag-burning is such an attempt, must be our prime concern. We cannot afford to experiment by permitting all acts and words denigrating our basic philosophies to freely reach the marketplace of ideas. The vitality of such a view was inherent in the determination of *Dennis* v. *United States*, 341 U.S. 494 (1951), *supra*, at 509-10, 71 S. Ct. at 867, when it was succinctly stated:

> "We must reject . . . the contention that success or probability of success [to overthrow the Government] is the criterion." (Concurring opinion.)

In another landmark case, this Court declared:

> "[T]he immediate danger is none the less real and substantial, because the effect of a given utterance cannot be accurately foreseen. The State cannot reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler's scale. A single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration. It cannot be said that the State is acting arbitrarily or unreasonably when in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration; . . . it may in the exercise of its judgment, suppress the threatened danger in its incipiency." (*Gitlow* v. *New York*, 268 U.S. 652, 669, 45 S. Ct. 625, 631 [1923], *supra*, [Sanford, J.].)

To paraphrase *Gitlow, supra,* are we required to wait for an epidemic to break out before the doctor is summoned?

The appellant's right as a citizen to criticize his country and to effectively participate in public affairs is not denied him by the fact that Sec. 1425, subd. 16, para. d, of the Penal Law of the State of New York, *supra,* also bars the use of "words" as well as "act" in the interdicted conduct affecting the flag of the United States. The use of "words" which "defile or defy . . . . or cast contempt" upon the flag "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is greatly outweighed by the social interest in order and morality." (See *Chaplinsky* v. *New Hampshire,* 315 U.S. 568, 572, 62 S. Ct. 766, 769 [1942]; CHAFEE, FREEDOM OF SPEECH 170 [1920].) The statute, being narrowly drawn, does not violate any constitutional mandates regarding the right to enjoy freedom of speech. And if there be any doubt as to the constitutional propriety of including "words" within the prohibition of the statute, which we do not anticipate (for the reasons already presented, and especially when we note the rebellious nature of the words employed herein simultaneously with the act performed), that doubt can easily be resolved by excising that language and leaving inviolate the punishment of the act of which the appellant was accused, except insofar as the language employed spelled out the "contempt" displayed by him.

> "[C]ourts will exert themselves to save part of a statute, and if valid and invalid provisions are incorporated in the same act, the former, if separable, will be upheld though the latter must fall . . ." (McKinney's Cons. Laws of N.Y., Book 1, Statutes, pp. 237-38, Section 150 and cases cited therein).

See also, *People ex rel. Alpha P.C. Co.* v. *Knapp*, 230 N.Y. 48, 60, 62-63 (1920) (Cardozo, J.), *rearg. denied*, 231 N.Y. 516 (1921), *cert. denied*, 256 U.S. 702, 41 S. Ct. 624 (1921).

Nor can any view that the instant statute has for its purpose the encouragement of adhering to symbols be accepted as sound. As aptly stated by Mr. Justice Frankfurter in *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 63 S. Ct. 1178 (1943), *supra*:

> "We are told that symbolism is a dramatic but primitive way of communicating ideas. Symbolism is inescapable. Even the most sophisticated live by symbols. *But it is not for this Court to make psychological judgments as to the effectiveness of a particular symbol in inculcating concededly indispensable feelings, particularly if the state happens to see fit to utilize the symbol that represents our heritage and our hopes.*" (*Id.* at 662, 63 S. Ct. at 1196, dissenting opinion, emphasis supplied.)

The appellant's reference to "symbols of sovereignty," and the extent to which free expression may be restricted in order to protect them, is not entirely accurate (Jurisdictional Statement, p. 7). The flag is better described as a symbol of "our heritage and our hopes."

Although the Court of Appeals of the State of New York predicated its determination upon the view that the statutory purpose of the statute was to "prevent the outbreak of . . . violence by discouraging contemptuous and insulting treatment of the flag in public" (*People* v. *Street*, 20 N Y 2d 231, 236 [1967], *supra;* Jurisdictional Statement, pp. 6a, 7a), and as was emphasized in *People ex rel. McPike* v. *Van De Carr*, 91 App. Div. 20, 26 (1st Dept. 1904),

aff'd, 178 N.Y. 425 (1904)*, *supra*, it was our position at the time of argument in the Court of Appeals, and to which we respectfully still adhere, that what is *also* apparent is that the contemptuous treatment of the flag of the United States of America,** which would shock the conscience of any true American, nay, of any decent person, is serious enough, *per se*, to be treated as a misdemeanor and punishable if committed "publicly."

It is the public display of such ignominious conduct which accentuates the danger of the act, not only from a "breach-of-the-peace" sense, but from the ineffaceable debasing effect, however slight, such desecration may have upon another's respect for the symbol of our cherished liberties, if what is thus seen goes unpunished.

What can be gained by abusing our flag under the guise of unfettered expression? Certainly, the harm that will result greatly outweighs the need for constitutional protection that is sought for such expression. An act of contempt done in public, as in this case, is condemnable because it demeans our flag in the eyes of others, and detracts from

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* See also, *Halter* v. *Nebraska*, 205 U.S. 34, 41, 27 S. Ct. 419, 421 (1906), *supra*. But see *People* v. *Picking*, Misc. , 23 N Y S 2d 148, 149 (N.Y.C. Mag. Ct. 1940), *aff'd*, 263 App. Div. 366 (1st Dept. 1942), *aff'd*, 288 N.Y. 644 (1942), *cert. denied*, 317 U.S. 632 (1942), rehearing denied, 317 U.S. 708 (1942), *supra*, where the court indicated that the aim of the statute was to "hold up the dignity of the American Flag . . ."

** It appears obvious that for the purposes of the statute herein involved, any asserted claim of "title" to the flag by a defendant would be meaningless. The flag, as such, like money, is the unique property of the United States of America and its citizens as a whole, except that the proper use of it by individuals is encouraged. The material ownership of the flag, although in the appellant, must yield to the stronger spiritual right to it as vested in our land and its citizens.

the respect one would ordinarily show for the flag if he were not "treated" to such a spectacle. It may even encourage others to perform similar, or as equally unforgiveable, acts against the flag of our Nation. Thus, in order to preserve the sanctity of the flag, the Legislature of the State of New York* wisely provided that an act such as committed by the appellant herein would suffer punishment if done "publicly." It is interesting to note that "contempt" is defined as follows:

> "4a: wilful disobedience to or *open* disrespect of the valid rules, orders, or process or the dignity or authority of a court or a judge acting in a judicial capacity . . ." (Webster's New Int. Dictionary [3rd ed. 1964] [emphasis supplied].)

It is noteworthy that Sec. 1425, subd. 16, para, d, of the Penal Law of the State of New York, *supra,* sets forth conduct violative of Article 134, which has for its sole purpose the prohibition of various forms of conduct, specified in detail, and described as "Malicious Mischief." All of this has been superseded by L. 1965, c. 1031, sec. 52, eff. Sept. 1, 1967, and further identified as Section 136 of the General Business Law of the State of New York. This would indicate an *additional* legislative purpose to protect the flag from public desecration *dehors* any desire to prevent a breach of the peace. Otherwise, many acts of desecration would escape punishment because of the difficulty in showing that a breach of the peace occurred, or might have been occasioned (*i.e.,* when the flag is used for advertising purposes). The proscription, therefore, is two-pronged.

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* See 51 N.Y. State Dept. Rep. 240 (1934), and 1941 N.Y. Att'y Gen. Rep. 465, *supra.*

Thus, "open," which is synonymous with "public," when considered in the light of the above definition of "contempt," lends significance to the view that punishment in the instant case is mandated, not only for a "breach of the peace" or its likelihood, but, also, for the act of disrespect, in and of itself. The contempt of the type shown in the above dictionary meaning does not need to rest upon any consideration of "breach of the peace," since what is punished is the "demeaning" of, or casting disrespect upon, a court and judge in the presence of others who comprise the "public." And so it is with the instant statute; it is the contumelious conduct toward the flag of the United States in the presence of others which we seek to reproach so that a symbol of our liberties is not relegated to a state of opprobrium.*

It must not be overlooked that there was a strong probability indeed that the appellant's act could easily have resulted in a breach of the peace. A war veteran, for example, would not be likely to be insensible to the sight of the appellant's desecration of the flag.

Had not the police officer chanced to be nearby, there would have been a grave possibility that the impact of the appellant's conduct might have penetrated the recesses of the minds of some of those passersby in that socially and economically-disadvantaged area, and thus incited violent action favoring the appellant's act. Such an occurrence is not too remote when we consider the various disturbances throughout the Country in recent times. That it did not happen, though fortunate, is of no import, for, to reiterate, there

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* See *State* v. *Peacock*, 25 A. 2d 491 (Sup. Jud. Ct., Maine, 1942) (court's charge regarding "publicly" held erroneous).

was a likelihood of it, and, in any event, the appellant's "contempt" for the flag "publicly" warrants punishment under the statute.

Appropriate, indeed, is the language of Mr. Justice Douglas who, in recognizing that conditions may affect behavior, stated in *Dennis* v. *United States*, 341 U. S. 494, 71 S. Ct. 857 (1951), *supra*:

> "In days of trouble and confusion, when bread lines were long, when the unemployed walked the streets, when people were starving, the advocates of a short-cut by revolution might have a chance to gain adherents." (*Id.* at 588, 71 S. Ct. at 906, dissenting opinion.)

Appellant's contention that the statute does not define with sufficient clarity the words or acts proscribed, thus sweeping within its ambit conduct both innocent and criminal (see Jurisdictional Statement, pp. 13-14, 16-17), is belied by the very verbiage of the enactment. The statute is concise and provides that no person "[*s*]*hall publicly mutilate, deface, defile or defy, trample upon, or cast contempt upon either by words or act . . . the flag of the United States of America,*" and that the object which the statute protects from desecration is one "upon which shall be shown the colors, the stars and the stripes . . . or by which the person seeing the same, without deliberation, may believe the same to represent the flag . . . of the United States of America." (Sec. 1425, subd. 16, para. d, of the Penal Law of the State of New York, *supra*). There is no doubt as to what was intended to be forbidden at the time the statute was enacted. The words "defile," 'defy," "cast contempt," are

sufficiently clear to apprise a person of the conduct the subject statute is intended to ban.

> "[A] criminal statute must be sufficiently definite, clear and positive to give unequivocal warning to citizens of the rule which is to be obeyed. It is also true, of course, that all presumptions and intendments favor the validity of a statute and mere doubt does not afford sufficient reason for a judicial declaration of invalidity.
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> * * * * *
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> "The test is whether a reasonable man subject to the statute would be informed of the nature of the offense prohibited and what is required of him." (See *People* v. *Byron*, 17 N Y 2d 64, 66, 67 [1966] [Keating, J.].)

And, also:

> "The clarity and certainty necessary to satisfy constitutional requirements may be acquired . . . by reference to the context in which the term is used." (See *People* v. *Merolla*, 9 N Y 2d 62, 66 [1961] [Froessel, J.].)
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> "All parts of a statute are to be construed together . . ." (McKinney's Cons. Laws of N.Y., Book 1, Statutes, Section 130 and cases cited therein; see also, Section 141, same authority.)

In *United States* v. *Wurzbach*, 280 U.S. 396, 399, 50 S. Ct. 167, 169 (1930), Mr. Justice Holmes aptly stated:

> "Whenever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the

criminal law to make him take the risk. *Nash* v. *United States*, 229 U.S. 373."

To the same effect, see *United States* v. *Petrillo*, 332 U.S. 1, 7-8; 67 S. Ct. 1538, 1542 (1947).

In *State* v. *Schlueter*, 127 N.J.L. 496, 23 A. 2d 249 (Sup. Ct., New Jersey 1941) the court, in affirming defendant's conviction as the result of her conduct (she was a self-confessed Nazi) in tearing and crumpling a small American flag and throwing it to the ground, stated:

> "We understand that the statute, in making it a misdemeanor to deface or to defile the flag, used those words in their meaning of 'dishonor'. 'Dishonor' is purposeful. The word implies a lively sense of shaming or an equivalent acquiscent callousness. For illustration: a blind man stumbles over the flag and, not knowing what it is, walks upon it and then casts it aside. Has he 'trampled' upon the flag? Has he 'defaced' or 'defiled' it? Has he 'dishonored' it? We think not; because those words carry with them, by inherent meaning, an attitude of mind . . ." (*Id.* at 250-51.) (Case, J.)

The statute herein involved does not create any "[b]lurred signposts to criminality" (*United States* v. *Congress of Industrial Organizations*, 335 U.S. 106, 142, 68 S. Ct. 1349, 1367 (1948)) since it is narrowly drawn to encompass the exact purpose of the statute—to assure responsible actions and judicious dissent insofar as the flag of the United States of America is concerned.

Appellant's reliance on *Baggett* v. *Bullitt*, 377 U.S., 360, 84 S. Ct. 1316 (1964), is inappropriate. (See Jurisdictional Statement, pp. 16-17.) The "range of activities" referred

to in *Baggett, supra,* at 371, 84 S. Ct. at 1322, which might be considered disrespect following the taking of oaths by teachers, said oaths designed to combat subversive conduct, cannot be equated with "words or act[s]" (Sec. 1425, subd. 16, para. d, of the Penal Law of the State of New York, *supra*) aimed at desecrating our flag. To reiterate, the statute does not require any positive conduct and is, therefore, unlike the one in *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624, 63 S. Ct. 1178 (1943), *supra,* which required saluting the flag. An intent to dishonor the flag is easily recognizable for it is not left to surmise.

It is undeniable that the appellant by his statements at the time of the burning meant to degrade and lessen the esteem for the flag of our Country, and by the act of burning it in a public place, intended that others should share the same feelings with him. It was this fear which prompted the New York Legislature to pass the statute so many years ago (derived from Chap. 272, Sec. 1, of the Laws of 1903).

Appellant's reliance on *Winters* v. *New York,* 333 U.S. 507, 68 S. Ct. 665 (1948), is not well taken. In *Winters, supra,* a reading of Section 1141(2) of the Penal Law of the State of New York (Obscene Prints and Articles), as it then read, indicated to the United States Supreme Court that the statute would be difficult to enforce since it would create a problem in determining when such material would be interdicted by the statute. There was a possibility that collections of other stories, otherwise unexceptional, might also be considered "massed" so as to become "vehicles for inciting violent and depraved crimes." (*Id.* at 520.) In the instant appeal no such problem exists for the statute herein involved is clear as to the type of conduct proscribed so

that innocent acts affecting the flag of the United States of America are not brought within its ambit. (See e.g., *State* v. *Schlueter*, 127 N.J.L. 496, 23 A. 2d 249 [Sup. Ct., New Jersey 1941], *supra*.)

To reiterate, the instant statute concisely apprises the public of the conduct intended to be prohibited and clearly mandates law enforcement officers of their duty to prevent its breach. (See *Giacco* v. *Pennsylvania*, 382 U.S. 399, 402-03, 86 S. Ct. 518, 520-21 [1966]. Compare *Lambert* v. *California*, 355 U.S. 225, 78 S. Ct. 240 [1957].) Since its wording does not becloud the sanctions inherent therein, there is no violation of the due process clause of the Fourteenth Amendment.

In concluding, it is respectfully prayed that no constitutional guarantee be permitted to shield the appellant's act from punishment, and whether this Court shall, or shall not, attach the quality of symbolic expression to the burning of the flag of the United States, it is, nevertheless, so patently offensive to, and "sacrilegious" of, the deep traditional feelings of the American and the very spirit of this Country's history, that it would be unthinkable to shelter such conduct under the protective mantle of our treasured Constitution with which the flag is inseparably fused, so as to require the need for the First Amendment to be considered. To do that, would make constitutional guarantees the very means of self-annihilation!

> "This flag, which we honor and under which we serve, is the emblem of our unity, our power, our thought and purpose as a nation. It has no other character than that which we give it from generation to generation. The choices are ours. It floats in majestic silence above the hosts that execute those

> choices, whether in peace or war. And yet, though silent, it speaks to us—speaks to us of the past, of the men and women who went before us, and of the records they wrote upon it.'"*

It follows, therefore, that there is no substantial question which would warrant any further argument in this Court. Nor is there any basis for any claims that the pertinent statute, which satisfies constitutional requirements, is vague, ambiguous, indefinite, or overbroad so as to result in a deprivation of individual liberty without due process of law, in violation of the Fourteenth Amendment to the United States Constitution.

CONCLUSION

For the foregoing reasons, the appeal should be dismissed, or, in the alternative, that the order of the Court of Appeals of the State of New York appealed from, be affirmed.

Dated: Brooklyn, New York
January 2, 1968

Respectfully submitted,

AARON E. KOOTA
District Attorney
Kings County
Attorney for Appellees

HARRY BRODBAR
Assistant District Attorney
of Counsel

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* President Woodrow Wilson in a Flag Day address on June 14, 1917.